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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 614

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *Petitioner*,

v.

NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., individually and as Chairman of the National Mediation Board; ROBERT O. BOYD, individually and as Member of the National Mediation Board; LEVERETT EDWARDS, individually and as Member of the National Mediation Board; AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; UNITED AIR LINES, INC.; and BRANIFF INTERNATIONAL AIRWAYS, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RUTH WEYAND
1346 Connecticut Ave., N.W.
Washington 6, D. C.

LEE LEIBIK
343 South Dearborn Street
Chicago 4, Illinois

Attorneys for Petitioner

RITA C. DAVIDSON
1346 Connecticut Ave., N.W.
Washington 6, D.C.

Of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Air Line Stewards and Stewardesses Association, International, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on July 13, 1961 (Appendix B, *infra*, p. 3a).

OPINION BELOW

The opinion of the court below (Appendix C, *infra*, pp. 4a-6a) is reported at 294 F. 2d 910.

JURISDICTION

The judgment of the court below was entered on July 13, 1961 (Appendix B, *infra*, p. 3a). A petition for rehearing en banc filed within the proper time (R. 369) was denied on September 20, 1961 (R. 392). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). Jurisdiction in the district court was based primarily on 28 U.S.C. 1337.

QUESTIONS PRESENTED

1. Whether a hearing before the National Mediation Board or before a federal district court upon contested issues of fact is required by Section 2 of the Railway Labor Act (45 U.S.C. 152), the due process clause of the Fifth Amendment to the Constitution of the United States or the rules of procedure governing federal district courts, before a suit to set aside a certification of the National Mediation Board may be dismissed for want of jurisdiction on the assumption that the facts are other than those which the plaintiff alleged and offered to prove both before the National Mediation Board and the district court.

2. Whether a federal district court has jurisdiction of a suit brought by a union composed of air line stewardesses, which had previously been the duly certified bargaining representative and held valuable collective bargaining contracts, to set aside, as violative of due process of law and of Section 2 of the Railway Labor Act, orders of the National Mediation Board,

entered without a hearing as requested, certifying as the representative of stewardesses, in the place of the union composed of stewardesses, a union of pilots who have command authority over stewardesses and are management representatives and supervisors in their relationships with stewardesses.

3. Whether Section 2 of the Railway Labor Act bars certification as the representative of non-supervisory crew members of airplanes of a union composed of management representatives having full command authority and supervision over the non-supervisory crew members.

4. Whether a federal district court has jurisdiction to grant injunctive relief to prevent carriers from interfering with, influencing and coercing their employees to cease being represented by one union and to be represented by another union, in violation of Section 2, Third and Fourth of the Railway Labor Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment to the Constitution of the United States and of the Railway Labor Act (45 U.S.C. 151, *et seq.*) are set forth in Appendix A (*infra*, pp. 1a-2a).

STATEMENT OF THE CASE

This is a suit brought in the federal district court by the Air Line Stewards and Stewardesses Association, International (hereinafter sometimes called "ALSSA"), to enjoin the National Mediation Board from certifying, or if certification should issue while the suit was pending, to set aside the certification of the Air Line Pilots Association (hereinafter sometimes called "ALPA") as the collective bargaining representative of stewardesses employed by United Air

Lines and Braniff International Airways (J.A. 1-12).[1] The suit also sought to enjoin United and Braniff from influencing, interfering with or coercing stewardesses not to join or remain members of ALSSA (J.A. 11).

ALSSA had been the duly certified and recognized collective bargaining representative of the stewardesses employed by United and Braniff at all times since 1946 and 1947 (J.A. 4, 13, 14, 15) and as such representative was a party to valuable collective bargaining contracts with both United and Braniff in existence at the time the Mediation Board certified ALPA as the representative of the stewardesses employed by United and Braniff (J.A. 4-5, 17-84). At no time prior to January 1961 had ALPA ever sought to represent stewardesses (J.A. 3).[2]

When the Mediation Board notified ALSSA that ALPA had filed petitions to represent the stewardesses on United and Braniff (J.A. 4, 13, 14), ALSSA filed a request with the Mediation Board for a formal hearing at which it could introduce evidence to show that ALPA was disqualified to represent stewardesses because it was composed of pilots, no stewardess was a

[1] "J.A." references are to the Joint Appendix filed in the Court of Appeals, nine copies of which are being filed with the Clerk of this Court.

[2] At the time this suit was instituted ALSSA was the recognized representative for bargaining of 90% of all air line stewardesses and other flight service employees in the United States, and had collective bargaining contracts with 30 carriers by air, including all 12 major trunk carriers by air (J.A. 2). As a result of ALPA's raids on its bargaining rights ALSSA, while this suit has been pending, has been involved in proceedings before the Mediation Board which resulted in recertifying ALSSA after it won elections on Trans World Airlines (R-3511), Eastern Air Lines (R-3507), Northwest Airlines (R-3454), Northeast Airlines (R-3518), Western Air Lines (R-3498), Pacific Air Lines (R-3508) and Caribbean Atlantic Airlines (R-3499).

member or eligible to membership, and pilots by reason of the command authority over stewardesses vested in them by the Civil Aeronautics Board regulations and by the carriers, stood in the relationship of management to stewardesses (J.A. 85-96). ALSSA pointed out that the Civil Aeronautics Board had interpreted its regulations as giving pilots "full control and authority without limitation" over stewardesses and their duties (J.A. 86, 92); that the carriers have insisted that the pilots have the same relationship to stewardesses as captains of seagoing vessels have toward unlicensed crew members (J.A. 86, 92); that stewardesses were discharged or otherwise disciplined by the pilot or on his recommendation (J.A. 86-87, 92-93); and hence representation of stewardesses by pilots would violate Section 2 of the Railway Labor Act.

The Mediation Board denied ALSSA's request for hearing. In doing so, the Board stated (J.A. 97-98):

> "It will be noted there is no restriction contained in the language of the Act on who may be certified as the representative of the employees of a carrier subject to the Act. However, the Board for many years has had a policy of not certifying a carrier or an officer of a carrier as an employee representative for the purposes of the Act. The Board is of the opinion that the Air Line Pilots Association is not barred, under such policy."

In denying ALSSA a hearing the Board did not make clear, and has never made clear to this day whether it was taking the position that pilots do not supervise stewardesses on behalf of management or whether its position was that such supervision on behalf of management is irrelevant under the Railway Labor Act.

ALSSA thereupon filed this suit in the district court naming as defendants the National Mediation Board

and its members O'Neill, Boyd and Edwards, the two air carriers involved, United Airlines, Inc. and Braniff International Airways, and ALPA (J.A. 1). The complaint sought to enjoin the certification of ALPA until a final determination of the eligibility of ALPA to represent stewardesses (J.A. 11). The claim that the Mediation Board had denied ALSSA due process of law in violation of the Fifth Amendment to the Constitution of the United States by denying a hearing as requested (J.A. 8) and that the Board had exceeded its jurisdiction and authority under the Railway Labor Act, were clearly set forth (J.A. 8-9). With respect to the charge of interference, restraint and influence, ALSSA in its complaint alleged in part, as follows:

> "The defendant, Air Line Pilots Association, International, is an unincorporated association composed of pilots many of whom occupy important management positions on commercial air carriers including but not limited to airline management positions such as president, vice president, high level positions in airline operations departments, chief pilots, assistant chief pilots, flight instructors and members of management committees which bargain with the Air Line Stewards and Stewardesses Association, International, and other labor organizations. In many instances pilots who are members of the Air Line Pilots Association, International sit as management representatives hearing grievances of stewards and stewardesses. The management hierarchy on airlines, without exception, is permeated with active members of the Air Line Pilots Association and the prevalence of supervisory pilots in high level managerial positions is a marked characteristic of the airline industry" (Para. 4, Complaint, J.A. 3). . . .
>
> ". . . Braniff International Airways and United Air Lines, Inc., have each vested in their pilots

authority in the interest of their employer to remove stewards, stewardesses and pursers from active duty, to recommend their discharge, to discipline them, to assign them duties, to direct their performance of duties and to recommend that they be rewarded or disciplined, in all of which respects the pilots thereby are agents of Braniff and United in dealing with the stewards, stewardesses and pursers . . ." (Para. 12, Complaint, J.A. 7). . . .

"The defendants, United Air Lines, Inc. and Braniff International Airways, through the actions of their respective pilots have each interfered with, influenced and coerced the respective stewards, stewardesses and pursers employed by said defendants in the designation of representatives to represent said stewards, stewardesses and pursers in violation of Section 2, Third, of the Railway Labor Act (45 U.S.C. 152, Third), and have each interfered with the organization of its stewards, stewardesses and pursers, and have each influenced and coerced stewards, stewardesses and pursers in an effort to induce them to join the Air Line Pilots Association and not to join or remain members of the Air Line Stewards and Stewardesses Association, in violation of Section 2, Fourth, of the Railway Labor Act (45 U.S.C., 152, Fourth)" (Para. 18, Complaint, J.A. 9, 10).

ALSSA sought a temporary restraining order to prevent the Mediation Board from conducting an election with ALPA on the ballot; this motion was denied (J.A. 101, 334).

ALSSA then moved for a preliminary injunction; the Mediation Board, O'Neill, Boyd and Edwards moved to dismiss or, in the alternative, for summary judgment, and ALPA and United Air Lines moved to dismiss (J.A. 101, 242, 321, 335). ALSSA in opposing these motions filed the appropriate pleadings required

by the rules of the District Court of the District of Columbia to defeat a motion for summary judgment, namely, a "Statement of Genuine Issues" in which ALSSA alleged that the following genuine issues of fact exist and require litigation (J.A. 337):

> "(1) Plaintiff asserts that defendant Air Line Pilots Association is composed of pilots who function as representatives of management in supervising stewards and stewardesses (Complaint, ¶¶ 4 and 12).
>
> "(2) Plaintiff asserts that defendants United Air Lines and Braniff International Airways, through their pilots, interfered with, influenced and coerced their stewards and stewardesses in the designation of representatives, and interfered with such employees' freedom to organize (Complaint, ¶ 18)."

In respect to the foregoing issues of fact ALSSA explained its position to the district court as follows (J.A. 337-338):

> "If it is the defendants' position that pilots are not supervisory or management employees, there is then a clear issue of fact as between plaintiff and defendants, and as to this issue plaintiff was unlawfully deprived of a hearing by the National Mediation Board. If, however, it is the position of defendants that the supervisory status of pilots is irrelevant to their right to represent stewards and stewardesses, such a position is unlawfully inconsistent with the Mediation Board's own policy of not permittting company officials to serve as employees' bargaining representatives (Complaint, Exhibit No. 8), and such a position violates Section 2, Ninth of the Railway Labor Act in that said Section mandates the Board to 'insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier'."

Supporting affidavits were attached (J.A. 340-348) which included excerpts from United's stewardess manual in which United stated "All stewardesses and flight stewards are responsible to the captain" (J.A. 347).

The district court heard the motions to dismiss and for summary judgment, limiting argument to the question of the court's jurisdiction. After the submission of memoranda by the parties, the district court granted the motions to dismiss and motion for summary judgment on the ground that the court lacked jurisdiction under *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301, 302, 303 (J.A. 352).

Upon appeal to the United States Court of Appeals for the District of Columbia Circuit, judgment was affirmed (R. 368). The court of appeals, although reciting that the suit was rightly dismissed for lack of jurisdiction under *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, did not address itself to the jurisdictional issue as such but instead decided on the merits that the Railway Labor Act does not forbid representation of the stewardesses by a union of pilots who "perform some supervisory and managerial functions in regard to stewards and stewardesses" (p. 5a, *infra*, Appendix C). The court ruled that no constitutional question was presented since the Mediation Board is not required to grant any hearing (p. 5a, *infra*, Appendix C). With respect to the allegations in the complaint that United and Braniff had influenced, interfered with and coerced stewardesses to transfer their representation rights from ALSSA to ALPA, the court ruled that this claim was not within the jurisdiction of the district court but rather the remedy was application to the United States

District Attorney to institute a criminal prosecution under Section 2, Tenth of the Railway Labor Act (p. 6a, *infra*, Appendix C).

REASONS FOR GRANTING THE WRIT

1. This case seeks protection from this Court for the important constitutional right to be accorded a hearing on disputed issues of fact as a prerequisite to administrative or judicial denial of substantive rights based on an adverse factual decision. The jurisdictional problems posed for the court below by this Court's decision in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), led the court below to avoid a direct analysis of jurisdiction available to it under that decision by doing what this Court has done on occasion,[3] namely, affirming a dismissal for want of jurisdiction by determining that the administrative agency involved had not acted unlawfully. But where this Court has followed that procedure, there had been a full hearing on all relevant issues of fact and law before the administrative agency, with a full record before the courts for review, whereas here the administrative agency expressly refused to hold any hearing (J.A. 98, 100). In the instant case, the court below, by placing an adverse interpretation on the facts to hold that there was no case and hence no jurisdiction, deprived petitioner of due process of law because at no time had petitioner been afforded any hearing of the disputed factual issues.

That this is an accurate analysis of the decision below is evident on a study of the record. Nowhere in its ruling denying petitioner a hearing (J.A. 98, 100)

[3] *Inland Empire District Council v. National Labor Relations Board*, 325 U.S. 697, 709-701, 703 (1945).

nor in its pleadings nor briefs in the court below has the Mediation Board ever taken the position that, if ALPA is composed of persons having full managerial and supervisory power over stewardesses as petitioner alleges, it may nevertheless properly serve as the representative of stewardesses under the Railway Labor Act. Rather the Mediation Board and the courts below seem to be assuming that ALPA is not the kind of an organization which petitioner has alleged and offered to prove it to be. This constitutes a decision of the case on disputed factual issues without a hearing thereon. At all stages of the proceedings before the Mediation Board and the courts petitioner has requested (J.A. 90, 96, 337-338) and been denied a hearing on these factual issues (J.A. 98, 100, 352).

In addition, the court below expressly held (p. 5a, *infra*, Appendix C) that the Mediation Board is not required to give a hearing to a protesting union, citing in support thereof this Court's decision *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, at 304. The statement to which reference is made appears to be solely a reference to the failure of the Railway Labor Act to include any express requirement of a hearing. It does not appear to have been intended by this Court as a ruling that the Mediation Board might make adjudications of disputed factual issues without holding any hearing. In any event only dictum is involved because in that case the Mediation Board had in fact held a hearing at which all parties were afforded full opportunity to present evidence (Record before this Court in No. 48, October Term, 1943: pp. 28-29, 76, 83; *New York Central R.R. Co.*, 1 N.M.B. 197, 198), and there was no issue raised in this Court as to the adequacy of that hearing. However, review of the question of the right to a hearing is necessary

to clear up the misunderstandings to which the foregoing dictum of this Court has given rise.

This Court has long held that an administrative agency deprived parties of due process of law if it made any determination of a disputed fact pertinent to an adjudication affecting the rights of persons without affording to all affected persons a hearing with opportunity to present evidence. *Greene* v. *McElroy*, 360 U.S. 474, 496-497, 507-508 (1959); *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 135-136, 138-139, n. 11, 143, 164-165, 170-174, 178, 187 (1951); *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 300, 302, 304 (1937); *Morgan* v. *United States*, 298 U.S. 468, 480 (1936); *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U.S. 63, 68-69, 71 (1935); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 123 (1926); *Bratton* v. *Chandler*, 260 U.S. 110, 112-115 (1922). We have been unable to find any authority which would support the view that the Mediation Board may properly decide disputed issues of fact in a representation dispute without affording a hearing.

2. This Court should also grant a review in the instant case to clear up the notion which appears to prevail in the courts below that *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943) constitutes a complete bar to jurisdiction to review any proceeding of the Medation Board involving a representation dispute. Two other cases urging the Court to clarify this point are now pending before this Court on petitions for writs of certiorari. *UNA Chapter Flight Engineers' International Association, AFL-CIO* v. *National Mediation Board*, No. 5[illegible], October Term, 1961; *WES Chapter, Flight Engineers' International Association, AFL-CIO* v. *National Mediation Board*, No. 540, October Term, 1961. Unless this Court

clarifies the law in this respect no person deprived of rights before the Mediation Board has any possibility of obtaining a hearing before any court. Only in the District of Columbia can the requisite venue and service of process be had over the Mediation Board. Thus, the court below is the only court of appeals before which any cases involving the Mediation Board can come. But the court below has repeatedly and consistently announced and applied its view "that, under the Supreme Court's decision in *Switchmen's Union of North America* v. *National Mediation Board*, the Board's performance of functions assigned to it by the Act was not subject to judicial review." *American Air Export & Import Co.* v. *O'Neill*, 221 F. 2d 829, 831 (1955); *Order of Railway Conductors* v. *National Mediation Board*, 141 F. 2d 366, 367-368 (1944), certiorari sought and granted as to parties other than the National Mediation Board, 323 U.S. 688, and writ dismissed, 323 U.S. 166; *Decker* v. *Venezolana*, 258 F. 2d 153, 154 (1958); *Rutas Aereas Nacionales, S.A.* v. *Edwards*, 244 F. 2d 784, 785 (1957); *Radio Officers Union* v. *National Mediation Board*, 181 F. 2d 801 (1950); *United Transport Service Employees* v. *National Mediation Board*, 179 F. 2d 446, 450 (1949); *Kickland* v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529 (1948), certiorari denied 335 U.S. 843; *National Federation of Ry. Workers* v. *National Mediation Board*, 141 F. 2d 725 (1944); *United Transport Service Employees* v. *National Mediation Board*, 141 F. 2d 724 (1944).

This widesweeping refusal to inquire into any of the many claims of improper action by the Mediation Board is not justified by the opinion of this Court in the *Switchmen's* case and flies squarely in the face of the interpretation placed thereon by this Court in *Leedom* v. *Kyne*, 358 U.S. 184, 189-190 (1958). This

Court in *Leedom* v. *Kyne* held that the principles announced by the *Switchmen's* case were "controlling" (358 U.S. at 190) to require a holding that the district court had jurisdiction of an original suit in the federal district court to set aside a certification of the National Labor Relations Board on the ground that that Board had violated the National Labor Relations Act by including non-professional employees in the same unit with professional employees.

The court below in its opinion in the instant case (p. 5a, *infra*, Appendix C) distinguished *Leedom* v. *Kyne* by referring to the reasons given in its opinion in the *UNA Chapter, Flight Engineers* case, (294 F. 2d 905) filed the same day. The opinion in the *UNA Chapter, Flight Engineers* case is printed in Appendix D to this Brief, pp. 6a-12a, *infra*. In that opinion the court below seems to say (pp. 10a-11a, *infra*, Appendix D) that *Leedom* v. *Kyne* is not applicable to any case where the Mediation Board did not disobey an express command of the Railway Labor Act and did not confess it had exceeded its power, as the National Labor Relations Board conceded, though fighting jurisdiction, in the *Leedom* v. *Kyne* case. We do believe that the direction to the Mediation Board in Section 2, Ninth of the Railway Labor Act, that it "shall insure the choice of representatives by the employees without interference, influence or coercion." is just as explicit a statutory command as was present in *Leedom* v. *Kyne*. But whether the disobedience was of an express statutory command or of an implied statutory command cannot validly be controlling. Nor is there anything in the language or the reasoning of *Leedom* v. *Kyne* which can possibly be construed as limiting jurisdiction to instances where the administrative agency concedes it has exceeded its statutory powers.

In *Lecdom* v. *Kyne* this Court made jurisdiction of the courts dependent upon the existence of a right conferred by Congress which would be without remedy unless jurisdiction existed. Such a situation exists here. The complaint here alleges that Braniff and United have influenced, interfered with and coerced their respective employees to leave ALSSA and join ALPA (J.A. 9-10). The stewardesses are without any remedy which will rid them of ALPA as their certified bargaining agency unless either they have a direct suit against the Mediation Board or can join the Mediation Board in a suit against Braniff and United, so that a part of the relief from the influence, interference and coercion can include the setting aside of the certification issued by the Mediation Board. The instant suit is both a direct suit against the Mediation Board (J.A. 1-3) and also a suit against Braniff and United for relief from influence, restraint and coercion (J.A. 3-4, 9-11).

The court below cited *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944) as indicating the remedy available if ALPA's representation of the stewardesses proves inadequate or discriminatory (n. 1, p. 5a, *infra*, Appendix C). No injunction directing ALPA to provide adequate or nondiscriminatory representation can remedy the defect here present because no collective bargaining by stewardesses is possible so long as a union composed of management representatives is recognized as the exclusive spokesman for the stewardesses. No collective bargaining is possible where management sits on both sides of the bargaining table.

3. The question of whether a union composed of management representatives may properly be certified as the representative of the employees whom they su-

pervise is one of importance under the administration of the Railway Labor Act, which has never been but should be decided by this Court. Indeed, if the decision of the court below is to be read as holding that managerial employees may represent non-managerial employees, it would appear to be contrary to the spirit if not the letter of this Court's decisions in the cases of *Texas & N.O.R. Co.* v. *Brotherhood of Clerks*, 281 U.S. 548 (1930) and *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937). There this Court interprets Section 2 of the Railway Labor Act in a manner which clearly excludes a union in which management supervisory employees participate from representing employees whom they supervise. An analysis of the facts in the *Virginian Ry.* case as they are set forth in the lower court opinions 84 F. 2d 641, 643-644, and 11 F. Supp. 621, 624-625, shows that the Sasser statement, held to consitute illegal influence, interference and coercion, was most innocuous interference, restraint and coercion, as compared with that alleged in the instant complaint. If mere indications of employer favor for a union made by a supervisor are prohibited and disqualify an organization as a company union, certainly where the organization was formed by supervisors and its only officers and members to date have been supervisors (see Complaint, Par. 4, J.A. 3), it must be held disqualified.

Under analogous provisions of the National Labor Relations Act (49 Stat. 452, 29 U.S.C. 158) it is firmly established that a union composed of supervisory employees cannot represent non-supervisory employees. Both before and after the 1947 amendment to the National Labor Relations Act, which excluded supervisors from its benefits (61 Stat. 151, 29 U.S.C. 164

(a)), the National Labor Relations Board[4] and the courts[5] have held that completely apart from whether supervisors can bargain for themselves, unions in which supervisors participate are disqualified to represent supervised employes as such supervisory participation constitutes employer interference, restraint and coercion. We believe these rulings are fully applicable here, where the complete domination of the union by management representatives is assured by the fact that the nonsupervisory employees are not members of, nor eligible for membership, in the supervisors union.[6] This Court has repeatedly held that the National Labor Relations Act and the Railway Labor Act impose identical prohibitions on employers with respect to interference, restraint and coercion. This Court refers

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[4] *Douglas Aircraft Co., Inc.*, 53 N.L.R.B. 486, 489 (1943); *Rochester & Pittsburgh Coal Co.*, 56 N.L.R.B. 1760, 1763-1764 (1944); *Alaska Salmon Industry, Inc.*, 78 N.L.R.B. 185, 188 (1948); *American District Telegraph Co.*, 89 N.L.R.B. 1635, 1637 (1950); *Columbia Pictures Corp.*, 94 N.L.R.B. 466, 470 (1951); *Other Trawlers Union*, 100 N.L.R.B. 1187, 1188-1189, 1199 (1952); *Desilu Productions, Inc.*, 106 N.L.R.B. 179, 182 (1953).

[5] *Virginia Ferry Corp.* v. *N.L.R.B.*, 4th Cir., 1939, 101 F. 2d 103, 105-106; *N.L.R.B.* v. *Delaware New Jersey Ferry Co.*, 3rd Cir., 1942, 128 F. 2d 130, 137; *Local 636, Plumbers* v. *N.L.R.B.*, 1961, App. D.C., 287 F. 2d 354, 360-362; *Brotherhood of Transit Employees of Baltimore* v. *Madden*, 4th Cir., 1944, 147 F. 2d 439, 441-442.

[6] Under the ALPA constitution only a "flight deck operating crew member" is eligible for membership (J.A. 3, 176). The stewardesses are not "flight deck operating crew" members. The command authority is vested in all flight officers, with the pilot who serves as captain first in command, the pilot who is first officer second in command and the pilot or engineer who is second officer third in command (J.A. 118-119). Thus all members of ALPA have command authority over stewardesses, who must obey all commands and suffer discipline at the hands of any officer.

to cases under the two acts interchangeably and relies on cases under one act for construction of the other.[7]

4. Under the decisions of this Court in *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks*, 281 U.S. 548 (1930) and *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515, 545-547 (1937), the federal district courts have jurisdiction of claims of interference, influence or coercion by a carrier subject to the Railway Labor Act. The court below acted directly contrary to these decisions when it held that the district court did not have jurisdiction of the claim that United and Braniff had influenced, interfered with and coerced stewardesses to leave ALSSA and be represented by ALPA in violation of Section 2, Third and Fourth of the Railway Labor Act (J.A. 9-10).

In suggesting that "If appellant's charge of coercion has any substance, appellant can apply for the institution of a criminal prosecution," the court below (p. 6a, *infra*, Appendix C) ignored the holdings in the *Texas & New Orleans* case and in the *Virginian Railway* case, that the federal district courts had jurisdiction to remedy coercion by injunctive relief. The criminal penalties would not restore and preserve to the stewardesses their right to bargain through unions independent of supervisory control. Review should be granted to correct the court below in its holding that only criminal, and not, equitable remedies lie to protect the right to self organization and collective bargaining under the Railway Labor Act.

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[7] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-45, 47 (1937); *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346-347 (1944); *Steele* v. *Louisville & Nashville R.R. Co.*, 32 U.S. 192, 200 (1944); *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U.S. 711, 722, n. 14, 728, n. 25, 733, n. 30, 735, 737 (1945); *N.L.R.B.* v. *Pennsylvania Greyhound Lines Inc.*, 303 U.S. 261, 266-267 (1938).

CONCLUSION

For the foregoing reasons it is urged that a writ of certiorari issue to review the decision below.

Respectfully submitted,

RUTH WEYAND
1346 Connecticut Ave., N.W.
Washington 6, D. C.

LEE LEIBIK
343 South Dearborn Street
Chicago 4, Illinois

Attorneys for Petitioner

RITA C. DAVIDSON
1346 Connecticut Ave., N.W.
Washington 6, D.C.

Of Counsel

December 18, 1961.

APPENDIX A

Constitutional and Statutory Provisions Involved

The relevant provisions of the United States Constitution appear in the Fifth Amendment and provide as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *"

The relevant provisions of the Railway Labor Act, as amended (44 Stat. 577, 48 Stat. 926, 45 U.S.C. 151, *et seq.*) are as follows:

"Section 2. * * *

* * * * * * * *

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers, or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees

any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * * * * *

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

APPENDIX B

Judgment

Filed July 13, 1961

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

Civil 540-61
No. 16,340

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION, *Appellant*,

v.

NATIONAL MEDIATION BOARD, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia.

Before EDGERTON, WASHINGTON and DANAHER, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: July 13, 1961

APPENDIX C

Opinion of the United States Court of Appeals for the District of Columbia Circuit

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No. 16,340

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, A LABOR ORGANIZATION, *Appellant*,

v.

NATIONAL MEDIATION BOARD, ET AL., *Appellees*.

Appeal from the United States District Court for the District of Columbia

---

Decided July 13, 1961

Mr. Joseph L. Rauh, Jr., with whom *Mr. Mitchell J. Cooper* was on the brief, for appellant.

Mr. Morton Hollander, Attorney, Department of Justice, with whom *Mr. William H. Orrick, Jr.*, Assistant Attorney General, and *Mr. David C. Acheson*, United States Attorney were on the brief, for appellees, National Mediation Board, et al. *Mr. Harold D. Rhynedance, Jr.*, Assistant United States Attorney, also entered an appearance for appellees, National Mediation Board, et al.

Mr. Stuart Bernstein, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Messrs. Robert L. Stern* and *James Francis Reilly* were on the brief, for appellee, United Air Lines, Inc.

Mr. Robert Plotkin, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Mr. Stephen I. Schlossberg* was on the brief, for appellee, Air Line Pilots Association, International.

Before EDGERTON, WASHINGTON and DANAHER, *Circuit Judges.*

PER CURIAM: This case is similar in many respects to *UNA Chapter, Flight Engineers' International Association v. National Mediation Board*, No. 16332, decided this day. This, too, is a suit against the National Mediation Board and its members to set aside a determination in a representation case. Here, the Board recognized the stewards and stewardesses of United Airlines as a craft or class. It made a like ruling as to similar employees of Braniff Airlines. Each group voted in elections in which no other group participated. What is complained of is that the Board allowed the Air Line Pilots Association (ALPA) to appear on the ballot. It won both elections. The plaintiff appellant, the Air Line Stewards and Stewardesses Association, brought suit in the District Court, alleging that pilots perform some supervisory and managerial functions in regard to stewards and stewardesses, and hence that their union is ineligible to represent the persons whom they supervise. The short answer is that the Railway Labor Act, 45 U.S.C. 151 *et seq.*, does not forbid this, expressly or by implication.[1] The District Court rightly dismissed the suit for lack of jurisdiction under *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943). Appellant's reliance on *Leedom v. Kyne*, 358 U.S. 184 (1958), is misplaced, for the reasons given in our opinion in *Flight Engineers*.

Nor is any constitutional question presented. The Mediation Board—as distinguished from committees appointed by it—is not required to give a hearing to a protesting union. *See Switchmen's Union v. National Mediation Board, supra* at 304. Appellant's argument to the contrary is untenable. The complaint contains allegations that

[1] If in fact ALPA's representation proves inadequate or discriminatory, persons aggrieved will not lack remedy. *Cf. Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944).

United and Braniff coerced the stewards and stewardesses into voting for ALPA. These allegations seem purely conclusory, and based largely if not wholly on the argument that pilots are part of management. This sort of claim does not create jurisdiction in the District Court to set aside the Board's determination. See, 2 MOORE, FEDERAL PRACTICE para. 12.08, at 2244-45 (2d ed. 1960). If appellant's charge of coercion has any substance, appellant can apply for the institution of a criminal prosecution. See Railway Labor Act, Section 2, Tenth, 45 U.S.C. § 152.

Affirmed.

APPENDIX D

Opinion of the United States Court of Appeals for the District of Columbia Circuit

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No. 16,332

UNA CHARTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, APPELLANT,

v.

NATIONAL MEDIATION BOARD, FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD, ET AL., APPELLEES.

Appeal from the United States District Court for the District of Columbia

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Decided July 13, 1961

Mr. Isaac N. Groner, with whom *Messrs. I. J. Gromfine* and *William B. Peer* were on the brief, for appellant. *Mr. Herman Sternstein* also entered an appearance for appellant.

Mr. Morton Hollander, Attorney, Department of Justice, with whom *Mr. William H. Orrick, Jr.*, Assistant Attorney

General, and *Mr. David C. Acheson*, United States Attorney, were on the brief, for appellees, National Mediation Board, et al. *Mr. Carl W. Belcher*, Assistant United States Attorney at the time the record was filed, and *Mr. Harold D. Rhynedance, Jr.*, Assistant United States Attorney, also entered appearances for appellees, National Mediation Board, et al.

Mr. Stuart Bernstein, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Messrs. Robert L. Stern* and *James Francis Reilly* were on the brief, for appellee, United Air Lines, Inc.

Mr. Benjamin M. Shieber, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Benedict F. Fitzgerald, Jr.*, was on the brief, for appellee, Air Line Pilots Association, International.

Mr. William J. Potts, Jr., with whom *Mr. Andrew G. Haley*, was on the brief, for appellee, Richard L. Keller, *et al.*

Messrs. Clarence M. Mulholland, Edward J. Hickey, Jr., and *William G. Mahoney* filed a brief on behalf of Railway Labor Executives' Association as *amicus curiae*, urging reversal. *Mr. James L. Highsaw, Jr.*, also entered an appearance for Railway Labor Executives' Association, as *amicus curiae*.

Before EDGERTON, WASHINGTON and DANAHER, *Circuit Judges*.

WASHINGTON, *Circuit Judge*: This is a labor case, in which the central question is whether the Federal courts have jurisdiction to review a challenged order of the National Mediation Board. The UNA Chapter, Flight Engineers' International Association, AFL-CIO (FEIA), brought suit in the United States District Court for the District of Columbia against the National Mediation Board (NMB) and its members, the Air Line Pilots Association,

International (ALPA), and United Air Lines (United). The complaint said that the litigation was brought "to enforce the fundamental policy of the Railway Labor Act . . . and to enjoin defendants . . . from violating the Act by arrogating the right to create a new craft. . . ." Some 200 of United's flight engineers holding commercial pilot qualifications were permitted to intervene (the Keller group).

The basic controversy arose when ALPA requested that the NMB investigate an alleged representation dispute among United's pilots and flight engineers, theretofore represented by ALPA and FEIA, respectively; that it determine that all "flight deck personnel" (comprising both pilots and flight engineers) were the appropriate "craft or class" for representation purposes; that it hold a representation election in this "craft or class"; and that it certify the winner as the bargaining representative. Pursuant to Section 2, Ninth, of the Railway Labor Act,[1] the NMB designated a committee of three neutral persons, empowered by that section of the Act "after hearing . . . [to] designate the employees who may participate in the election.". One J. Glenn Donaldson was appointed chairman, and hearings commenced on December 1, 1959, the primary issue being the relationship and duties of the pilot, copilot and flight engineer. It was decided by the parties and the committee that visits should be made to United's training center to see how this three-man group actually functioned on piston and jet aircraft. Such visits were to be conducted only in the presence of ALPA and FEIA representatives. Subsequently, Mr. Donaldson, while on a personal trip aboard a United aircraft, accepted an invitation from the captain to sit in the cockpit and observe flight deck operations; it is alleged that the procedures shown him were atypical in that the personnel present (including a flight engineer) performed other than their accustomed duties.

[1] Added by 48 STAT. 1188 (1934), 45 U.S.C. § 152, Ninth (1958), as made applicable to airline common carriers, 49 STAT. 1189 (1936), 45 U.S.C. §§ 181-82 (1958).

At the next hearing session, the FEIA moved that Donaldson resign from the committee for participating in this off-the-record action. He refused, and the NMB denied a motion to remove him. The committee thereafter observed United's operations under the conditions agreed upon.

After 40 days of hearings, 5121 pages of testimony, and 595 exhibits, the committee on January 17, 1961, found that pilots, copilots, and flight engineers at United comprised the personnel of a single "craft or class" entitled to vote in a representation election. An election was held among this group, at which ALPA received 1682 votes and FEIA 58 votes. A certificate was thereupon issued by the Board to ALPA. The instant suit had already been commenced. Upon motion of the defendants-appellees the District Court ruled that it had no jurisdiction over the subject matter of the dispute, that no substantial constitutional question was presented, and that the complaint failed to state a claim upon which relief could be granted. It therefore dismissed the complaint. This appeal followed.

The court did not err when it dismissed the complaint for lack of jurisdiction. Under the Railway Labor Act only the NMB (or the committee designated by it) has the power to make craft or class determinations. *Switchmen's Union v. NMB*, 320 U.S. 297 (1943). The right given to employees is that of designating, by a majority of those comprising a "craft or class," their representatives. See 320 U.S. at 300-301. It has become well settled that in making "craft or class" determinations, the NMB may regroup, amalgamate, or splinter "historic" bargaining groups, taking into account technological and functional changes, and that the decision of the Board in setting up a "class" for representation in a jurisdiction dispute is unreviewable in the courts. *Brotherhood of Ry. & S.S. Clerks v. United Transp. Serv. Employees*, 320 U.S. 715, reversing 78 U.S.App.D.C. 125, 137 F. 2d 817 (1943); *Switchmen's Union v. NMB*, *supra*, reversing on jurisdictional grounds 77 U.S.App.D.C. 264, 135 F. 2d 785; *United Transp. Serv. Employees v.*

NMB, 85 U.S.App.D.C. 352, 179 F. 2d 446 (1949); and *General Comm. of Adjustment* v. *Missouri-Kan.-Tex. R. Co.*, 320 U.S. 323 (1943).[2]

Appellant alleges that the Board decision deprives the flight engineers, a minority group, of any free choice of representatives, destroys an historic "craft," and flies in the face of the "dominant" industry bargaining pattern. Just such arguments were made to and accepted by this court in *Brotherhood of Ry. & S.S. Clerks* v. *United Transp. Serv. Employees, supra.* The Supreme Court reversed, per curiam, 320 U.S. 715, citing *Switchmen's Union* and *General Comm.* v. *Missouri-Kans.-Tex. R. Co., supra.* Appellant stands in no better position.

Appellant urges, however, that jurisdiction exists under the Supreme Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). We cannot agree. In *Leedom* the Supreme Court carefully differentiated *Switchmen's Union* from the case before it, pointing out that the latter did not involve "review" of agency action, but the striking down of action in excess of delegated powers, in flat violation of the controlling statute—there the Labor Management Relations Act. See 358 U.S. at 188-190. It should be noted, also, that in *Leedom* v. *Kyne* the National Labor Relations Board did not deny that it had contravened its governing statute. See 358 U.S. at 187. No such admission is made here, and appellant has not pointed out any clear statutory limitation expressed by the Railway Labor Act which has been violated by the NMB. The action of the NMB, in contrast to

[2] Thus, to the extent its action is within its powers, NMB decisions are not subject to "review" by injunction suit, declaratory judgment action under 28 U.S.C. § 2201 (1958), or suit under Section 10 of the Administrative Procedure Act, 60 STAT. 243 (1946), 5 U.S.C. § 1009 (1958). *American Air Export & Import Co.* v. *O'Neill*, 95 U.S. App. D.C. 274, 221 F.2d 829 (1954); *Kirkland* v. *Atlantic Coast Line R. Co.*, 83 U.S. App. D.C. 205, 167 F.2d 529 (1948); *United Transp. Serv. Employees* v. *NMB*, 85 U.S. App. D.C. 352, 179 F.2d 446 (1949).

that of the NLRB in *Kyne*, adhered to the statutory pattern prescribed; the correctness of its delineation of the bargaining class is not open to judicial review.

Apart from the certification issue, appellant urges that a significant constitutional issue exists warranting the exercise of jurisdiction by the District Court.[3] The constitutional issue—denial of Due Process—is said to arise from the extra-record view of cockpit procedures in a United aircraft by the chairman of the committee, as described earlier in this opinion. Appellant argues that since the statute requires a "hearing," any *ex parte* investigation constitutes a totally invalidating irregularity. This does not follow, however, for appellant is attempting to place on the word "hearing" a unitary meaning of "adjudicatory hearing," which is unwarranted by the statutory scheme. The purpose of the Board (and similarly of its designated committee) is to find facts. See *Switchmen's Union* v. *NMB*, *supra* at 301. It does not fix rights and liabilities between parties, but "investigates," and determines the factual circumstances of a dispute; its functions are essentially legislative or rulemaking, and not adjudicative, for it defines "craft or class" and the rules for elections. *Ibid*; cf. *Inland Empire Dist. Council, Lumber Workers* v. *Millis*, 325 U.S. 697, 708-709 (1945). In legislative or rulemaking hearings, the scope of "official notice" is quite broad, limited only by essentials of fair notice and opportunity to rebut. See *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 530 (1946); *Market St. R. Co.* v. *Railroad Comm'n*, 324 U.S. 548, 561-562 (1945); 2 DAVIS, ADMINISTRATIVE LAW § 15.12 (1958). Thus, it is essential to appellant's position that it demonstrate, by more than the

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[3] See *United Transp. Serv. Employees* v. *NMB*, 85 U.S. App. D.C. 352, 179 F.2d 446 (1949).

[4] See *CAB* v. *Delta Air Lines, Inc.*, — U.S. — (29 U.S.L. WEEK 4731, 4734, June 12, 1961), quoting from COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 159.

conclusory allegations of its complaint, that it was prejudiced by this extra-record notice. See, e.g., *United States* v. *Pierce Auto Freight Lines, supra.* This it has not done. There is no issue here of nondisclosure or corruption.[5] From the time the committee hearings resumed after the challenged flight, the chairman and all parties were on notice of the flight, what occurred on it, and the fact that the procedures seen may have been atypical or "rigged." Following the incident, the committee took voluminous testimony and eventually issued a report mainly relying for its conclusions upon the relationship of the cockpit crew in jet aircraft,[6] and United's program for training flight engineers to become pilots. Donaldson's flight was not referred to. There was ample opportunity for appellant to place in the record any information considered necessary to rebut its effects. Under all the circumstances, we conclude that appellant has not presented a substantial constitutional question upon which the jurisdiction of the District Court could be grounded. *Inland Empire Dist. Council, Lumber Workers* v. *Mills, supra; United States* v. *Pierce Auto Freight Lines, supra; Market St. R. Co.* v. *Railroad Comm'n, supra; American Trucking Ass'ns* v. *Frisco Transp. Co.*, 358 U.S. 133, 144 (1958); cf. *Carter* v. *Kubler*, 320 U.S. 243 (1943).

For these reasons, the order of the District Court dismissing the complaint is hereby

Affirmed.

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[5] Compare *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292 (1937); *Sangamon Valley Television Corp.* v. *United States*, 106 U.S. App. D.C. 30, 269 F.2d 221 (1959).

[6] Donaldson's flight was on a piston aircraft.